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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

WALTER J. BEPPLER,

Appellant,

vs.

TOWNSHIP OF WASHINGTON and
TOWNSHIP OF WASHINGTON PLANNING BOARD,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS IN RESPONSE TO THE JURISDICTIONAL STATEMENT

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MOTION TO DISMISS

Appellee Township of Washington and Township of Washington Planning Board (sometimes collectively referred to as "Township of Washington") files the within Motion to Dismiss in response to the Jurisdictional Statement filed by Appellant Walter J. Beppler.

STATEMENT OF THE CASE

The case sub judice presents a factual situation in which a landowner subdivided a large tract of land into as many lots as was permitted under the applicable municipal zoning ordinance governing the size and frontage of lots in the subject zone. This action resulted in the creation of two undersized lots. The landowner applied for, and received, a variance for one of the lots from the municipal zoning board of adjustment, but never applied for a variance for the other undersized lot. In such posture, the municipal planning board approved the landowner's subdivision which expressly reflected the undersized lot herein under consideration as being excepted from the planning board's subdivision approval. Thus, the subject lot remained undevelopable as a direct result of the actions of the landowner in effecting a self-created hardship. The refusal of the Township of Washington to permit development on this self-created undersized lot brings to bear the application of established principles of law concerning undersized lots in a municipal zoning context.

Appellant, in his Jurisdicational Statement, seeks to invoke this Court's jurisdiction with respect to the case at bar utilizing the provision of the Fifth Amendment of the U.S. Constitution which prohibits the governmental taking of private property without just compensation. However, there was no governmental taking by

the Township of Washington since the zoning ordinance predated the Appellant's subdividing of his large tract of land into smaller lots for development purposes. The "taking" was by the Appellant himself since he chose to create a lot which was not a permissibly developable property in the applicable zone. The salient facts underlying the issues presented in the case at bar follows.

Walter Beppler, Appellant in this action, purchased the subject property, Lot 5H, Block 4102A, as part of a larger tract in July 1946. Lot 5H bears a frontage of 52.94 feet. The rear boundary of the property is only 23.27 feet in length. The sides are 95.03 feet and 93.59 feet respectively.

Bulk requirements had been established in the Township of Washington, State of New Jersey in 1941 by ordinance. The property in question was situated in a Class A Zone, where both the frontage and width requirements were 100 feet. The ordinance was and remained in force when Appellant both purchased and subdivided his property.

In 1947 the Appellant submitted for the Planning Board's approval a subdivision map reflecting several lots with the required 100 feet frontage. It included a newly created lot with a frontage of 85.15 feet, an undersized lot under the 1941 zoning ordinance. Another newly created lot having frontage of 52.94 feet was also reflected on the map. This lot, designated lot 5H on the subdivision map, is the subject of the case at bar.

On the subdivision map, the word "excepted" appears on the subject parcel. All of the other lots appearing on the subdivision map which were not part of the subdivision development submitted by the Appellant to the Township of Washington

Planning Board in 1947 bore the same notation. Thus, the Planning Board did not consider or pass upon any of these lots so noted, including the lot in question.

Conversely, the Planning Board did consider the undersized lot bearing frontage of 85.15 feet. However, the Planning Board did not have authority in 1947 to grant a variance to that undersized lot for development; rather, such authority rested exclusively within the province of a different municipal agency; namely, the Township of Washington Board of Adjustment.

Recognizing that the Planning Board had no authority to grant a variance for the development of an undersized lot, the Appellant requested the Board of Adjustment to grant a variance for the lot having frontage of the 85.15 feet. The application was made by letter dated April 13, 1947. At the January 1985 hearing before the current Planning Board, the letter application was marked as an exhibit. The letter indicated that the Planning Board in 1947 initially rejected the subdivision because the 85.15 lot did not have the required frontage for the zone. The subdivision map reflects that the Board of Adjustment granted approval for development of the 85.15 lot at its regular meeting held on April 24, 1947. Thereafter, the Planning Board approved the subdivision at its meeting of May 12, 1947.

At no time was approval given for the development of the lot having frontage of 52.94 feet (lot 5H), the lot which is the subject of the present appeal. It continued to bear the notation "excepted." It was never the subject of an application before the Board of Adjustment for a variance. The Planning Board never approved development of lot 5H, nor did it have the legal authority to do so.

Prior to the appellant's application before the current Planning Board, the Appellant had applied to the Zoning Board of Adjustment for a variance in 1982 for the lot with the 52.94 foot frontage, lot 5H. The denial of the variance was primarily based upon the doctrine of self-created hardship. Thereafter, Appellant filed suit in the Superior Court of New Jersey, Law Division, based upon the Zoning Board's denial.

During the pendency of that suit, Washington Township enacted an ordinance which addressed the development of undersized lots as a conditional use authorized by N.J.S. 40:55D-67. The ordinance provides a bifurcated procedure with reference to any application for development as a conditional use. The first phase involves an inquiry by the Planning Board as to whether or not the subject lot is eligible for development. The basic criteria for eligibility mirror the current state of the law in the State of New Jersey regarding permissible developments of undersized lots. The ordinance retained the long established and well recognized "self-created hardship" doctrine which appears in the case law of the State of New Jersey.

The ordinance provides that no lot shall be eligible for development under the ordinance unless all of the requirements set forth in the ordinance are satisfied. They include the following:

> The lot was in existence as a separate lot at the time of enactment of the earliest land use restriction which rendered the lot non-conforming.
>
> At the time of adoption of the earliest land use restriction rendering the lot nonconforming, and at all times subsequent

thereto, no legal or equitable owner of the lot has simultaneously held legal or equitable title to any contiguous land.

Neither the owner of the lot nor any of said owner's predecessors in title created the non-conforming condition of the lot or caused self-inflicted hardship on the lot however evidenced.

The current Planning Board determined that the Appellant was the owner of adjoining lots to the subject lot at the time of the first adoption of the zoning ordinance pertaining to the subject premises; that at the time of the adoption of the earliest land use restriction rendering the lot non-conforming, the Appellant was the legal owner of contiguous land; and that the Appellant by his own subdivision created the subject lot and created the non-conforming condition of said lot. Thus, the Planning Board determined that the subject lot was not an eligible lot for development under the ordinance.

Thereafter, Appellant appealed to the Superior Court, Law Division, which upheld the decision of the municipal planning board, entered judgment in defendants' favor. The Superior Court, Appellate Division, affirmed the Superior Court, Law Division's determination per curiam.

The Appellant filed a Notice of Motion before the New Jersey Supreme Court for leave to file a Petition for Certification out of time. Thereafter, the Appellant filed a Petition for Certification which was denied by the New Jersey Supreme Court.

DISCUSSIONS AS TO APPLICABLE LAW

Appellant claims that the action of the municipal planning board, which has been affirmed by each State Court reviewing such action, violates the Fifth Amendment of the U.S. Constitution by such action constituting a taking of appellant's property without just compensation. However, Appellant created his own dilema by seeking to maximize his profit in 1947 through his subdivision of a large tract of land into the most number of lots permitted by the municipal zoning ordinance then in effect. He did not have to subdivide this tract into as many individual lots as he chose. Rather, he could have made the subject lot part of a conforming lot, thus creating a slightly larger lot than was the minimum required in the applicable zone. Because he chose not to do this, he created, in effect, an unusable undersized lot. He now innocently claims that he has been deprived of the use of this undersized lot without having received just compensation under the guise of the Fifth Amendment. However, the actions of Appellant himself bar him from now claiming any violation of the provisions of the Fifth Amendment.

AS TO REFUSAL BY THE TOWNSHIP OF WASHINGTON TO PERMIT DEVELOPMENT OF THE SELF-CREATED UNDERSIZED LOT

The decisions of the State Courts below do not violate the provisions of the Fifth Amendment, and were based upon the existing case law of the State of New Jersey as outlined below.

Absent conduct which is wholly arbitrary and capricious, a court should not ordinarily disturb a planning board's determination. Kessler v. Bowker, 174 N.J. Super. 478, 480, 417 A 2d 34 (App. Div. 1979), certif. denied, 85 N.J. 99, 425 A 2d 264 (1980). The burden of establishing arbitrary conduct lies with the complaining party

(the Appellant herein). The Appellant failed to sustain his burden before the State Court, since the Planning Board's decision was fully supported by the record, and this determination was joined in by the Appellate Division in its decision, which was left undisturbed by the action of the New Jersey Supreme Court.

Washington Township's conditional use ordinance required the Board to consider: the existence of the lot as a separate entity prior to enactment of the ordinance; the inability to develop the land solely as a result of municipal land use restrictions; the existence of the lot as a separate entity at the time of enactment of the earliest land use restriction rendering the lot non-conforming; the ownership of contiguous land; and the existence of any self-inflicted hardship. These criteria reflect the state of law governing the development of undersized lots in the State of New Jersey. See, Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 605-8, 410 A 2d 1138 (1980).

At the hearing of January 2, 1985, the Planning Board had before it the subdivision map of 1946 and the letter from Walter J. Beppler dated April 13, 1947. The documentary evidence was supplemented by the testimony of Appellant. Mr. Beppler testified that he subdivided the tract thereby creating the non-conforming lot. Considerable time was devoted to the reasonable interpretation of the term "excepted." At the hearing, counsel for the Board specifically asked Mr. Beppler if the application in 1947 was limited to construction on the full sized lots and one lot bearing frontage of 85.15 feet, to the exclusion of lot 5H, the subject of this suit. Mr. Beppler replied that the application did not concern "the other lot", i.e., lot 5H.

The Trial Court properly concluded that the crucial issue pertained to the interpretation of the

subdivision map. Counsel for Mr. Beppler does not dispute this fact. A review of the subdivision map reflects that the word "excepted" appears on all lots which were not part of the subdivision development. Opposing counsel's argument before both the Trial Court and the Planning Board that the word "excepted" meant that a variance had been granted for that lot is totally unfounded in fact and in logic.

First, there was no record that variances were granted to all lots bearing the notation "excepted." The Appellant had come forth with no resolution or other document supporting that position.

Second, since the subject zone required 100 feet frontage for a lot to be developed there is no rationale for the word "excepted" to be noted on the several conforming lots adjacent to the subdivision brought before the Planning Board for consideration in 1947. For example, lots 4, 3, 5B, 2 and 5A all have the required frontage for the zone. Nevertheless, they bear the notation "excepted" on the subdivision map.

Third, appellant's counsel argued that lot 5H was the subject of a variance because the word "excepted" appeared thereon on the subdivision map. However, the court observed that lot 4B (the 85.15 foot frontage lot) which did, in fact, have a variance, did not have any such notation.

Fourth, since the application in 1947 was brought before the Planning Board by the Appellant, there is no rational explanation for variances to have been granted to lots not owned by the Appellant. For example, reference is made to lot 3 which was owned by one Otto Shultz, and lot 4 which was owned by one F. Leyer. The Trial Court made specific mention of this fact.

Finally, the Trial Court properly found that, in 1947, the Planning Board did not have the legal authority to grant such variances. Rather, that power rested solely with the Board of Adjustment. See, Loechner v. Campoli, 49 N.J. 504, 512, 231 A 2d 553 (1967), and the subsequent change in the Municipal Land Use Law. Appellant's letter dated April 13, 1947 to the Board of Adjustment specifically supports this position. The letter noted that the Planning Board had rejected the subdivision because "one lot did not have the required 100 foot frontage." The specific lot referred to in that letter, lot 4B, had "frontage of eighty five and fifteen one hundreds feet." The plaintiff requested action by the Board of Adjustment at its April 24th meeting. Action was taken by the Board of Adjustment with respect to the 85.15 foot frontage lot, the "short lot", as evidenced by its approval noted on the subdivision map. However, there was no application with respect to the 52.94 foot frontage lot, lot 5H, the lot herein under consideration.

Appellant argued, in effect, that the word "excepted" appearing on the 1947 subdivision map was the equivalent of a special use exception under the forerunner to the New Jersey Municipal Land Use Law. However, such a position is untenable.

Special exceptions (or special uses) under New Jersey's former municipal land use law represented affirmative decisions by the legislative body of a municipality that a particular use was desirable for the benefit of the municipality, and would be permitted in zones otherwise excluding such use, provided the location of the use met certain standards or requirements. See Tullo v. Millburn Township, 54 N.J. Super. 483, 49-491, 149 A 2d 620 (App. Div. 1959); Verona, Inc. v. Mayor and Council of West Caldwell, 49 N.J. 274, 282-283, 229 A 2d 651 (1967). A special exception could never be

implemented by a mere notation on a subdivision map. Rather, it would have had to be the result of a legislative enactment, i.e., an ordinance.

In the case sub judice, the Trial Court properly concluded the Planning Board's determination that the subject lot (lot 5H) did not meet the eligibility requirements for development under the municipality's ordinance was amply supported by the record below. Washington Township's 1941 zoning ordinance imposed a 100 foot frontage requirement on lots located in the subject zone. The Appellant purchased a tract of land which included the presently identified lot 5H subsequent thereto. Thereafter, the Appellant, being fully chargeable with knowledge of the pre-existing zoning requirements, elected to subdivide the tract of land which resulted in the creation of lot 5H as an undersized lot. Such action by the Appellant is a classic example of a self-created hardship.

The Trial Court observed that the law regarding non-conforming lots was fixed in Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 410 A 2d 1138 (1980). The standards articulated in that case are reflected in Washington Township's ordinance. That ordinance served as the basis for appellant's application to the Planning Board in January of 1985. In all such cases the first issue concerns the nature of the hardship, i.e., whether it was self-created. The Trial Court correctly concluded that the question of self-created hardship was the pivotal issue in the present case.

Reference is made to George F. Barnes Land Corporation v. Wyckoff Township Board of Adjustment, 174 N.J. Super. 301, 416 A 2d 431 (App. Div. 1980) which was specifically noted by the Trial Court. There the plaintiff also sought a variance from the municipal bulk requirements. Subsequent to the enactment of the ordinance

regulating minimum lot size, the larger tract was subdivided into two smaller non-conforming parcels. Id. at 303-04. Relief was denied since plaintiff's predecessor in title had created the non-conformity. Id. at 304.

In the present case it was the Appellant himself, not any predecessor in title, who created the hardship. The appearance of lot 5H on the subdivision map does not render the parcel exempt from the application of the zoning requirements, particularly where the adjacent lots were in common ownership.

The Planning Board's determination was amply supported by the record before it. Field v. Franklin Township, 190 N.J. Super. 326, 330, 463 A 2d 391 (App. Div. 1983). Consequently, there was no basis for the court to interfere with the board's decision.

AS TO REFUSAL BY THE TOWNSHIP OF WASHINGTON AND THE STATE COURT TO PERMIT INVERSE CONDEMNATION

Inverse condemnation is available where the value of property has been diminished by an excessive exercise of municipal zoning authority. Since the hardship in the present case was not the result of municipal action but was self-inflicted, there exists no basis to order the municipality to compensate Appellant for the "taking" of his property. Barnes, supra at 304.

Mere inutility is insufficient to establish a cause of action for inverse condemnation. Instead the owner's inability to use his property must be directly attributable to the unreasonable or excessive exercise of governmental authority. The facts in this case belie such a conclusion. The Planning Board concluded that Appellant did not come within the ambit of the undersized lot conditional use ordinance, because the

nonconformity was not caused by the municipality. Indeed, Appellant created his own hardship when he subdivided the tract in 1947, thereby creating the leftover parcel, lot 5H. Consequently, the Trial Court correctly interpreted the 1947 subdivision map in the same manner as the Planning Board had.

In support of his conclusion, the Trial Court noted the following facts. The lot was "grossly undersized." Situated in Class A zone, requiring frontage of 100 feet and a total area of 10,000 square feet, lot 5H bears frontage of 50 feet. At the rear, the property is only 23.27 feet wide. Contrary to opposing counsel's conclusion, construction of a dwelling upon the subject lot would both impair the intent of the zoning ordinance and diminish the quality of the residential area.

As noted previously, an examination of the subdivision map in light of the surrounding facts and circumstances, compels the conclusion that no variance was granted for lot 5H by means of the word "excepted." At the time of the subdivision in 1947, Mr. Beppler owned lot 5H as well as adjoining property. As the Trial Court noted, Appellant could have added the additional 50 feet to the adjoining lot, lot 5G, and perhaps he could have commanded a greater purchase price.

According to the Trial Court, the simple fact is that Mr. Beppler "got as many lots out of it as he could, and he had a piece left over that he decided to keep for himself. That's the only interpretation that can be given." It bears emphasis that Appellant made no effort to build upon lot 5H, the subject of this appeal, until approximately 20 years later. The record amply supports the fact that the hardship was self-created. Since the inutility of Appellant's property is directly attributable to his own conduct, and <u>not</u> of any excessive exercise of the

zoning powers, there was no legal basis to authorize inverse condemnation. This determination was correctly affirmed by the Superior Court, Appellate Division, which determination was upheld by the action of the New Jersey Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that respondent's within Motion to Dismiss should be granted.

Respectfully submitted,

WURTZEL & POLLER

By /s/ Kenneth G. Poller
KENNETH G. POLLER